FILE COPY

Petition not printed

Office - Supreme Court, U.S.
FILED
DEC 30 1942
CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,
Petitioners,

v.

THE NORTH SHORE CORPORATION.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF FOR PETITIONERS.

LUCIEN H. BOGGS,
Counsel for Petitioners.

DILLON HABTRIDGE,
Of Counsel:

INDEX.

Table of Contents.

	Page
I. Opinions below	1
II. Jurisdiction	1
III. Statement of the Case	1
IV. Question presented	5
V. Specification of Errors	5
VI. Argument	6
A. The Circuit Court of Appeals erred fundamentally in holding that the coverage of the employee under the Act must be determined by the relation of the employer to interstate commerce	6
B. The Circuit Court of Appeals further erred in resting its judgment upon decisions of this Court which were not relevant at all to the case at bar	7
C. The complaint shows petitioners are "engaged in commerce", and so are within the coverage of the Fair Labor Standards Act	9
D. The construction of the Fair Labor Standards Act for which petitioners contend is strongly supported by decisions under comparable federal statutes	13
Conclusion	16
Appendix A Excerpts from Fair Labor Standards Act of 1938	17
Appendix B Opinions of Wage and Hour Administrator Excerpted from Wage and Hour Manual, 1941 Edition	19

Table of Cases

Arsenal Building Corp. v. *Walling*, —— U. S. ——, 86 L. Ed. 1954 (No. 924, Oct. Term, 1941)	7
Atkocus v. *Terker*, 4 Lab. Cas. 60,724	11

Page

Covington & Cincinnati Bridge Co. v. *Kentucky*, 154 U. S. 204 8
Detroit Bridge Co. v. *Tax Board*, 294 U. S. 83 8
Fleming v. *Hawkeye Pearl Button Co.*, C. C. A. 8, 113 F. 2(d) 52 10
Henderson Bridge Co. v. *Kentucky*, 166 U. S. 150 8
Kinzell v. *Chicago M & S. P.*, 250 U. S. 130 13
Kirschbaum v. *Walling*, —— U. S. ——, 86 L. Ed. 1054 (No. 910, Oct. Term, 1941) 7
Louisville & Nashville R. R. Co. v. *Parker*, 242 U. S. 13 14
Overstreet v. *North Shore Corp.*, 43 F. Supp. 445, 128 F. 2(d) 450 ..... 1, 2
P. B. & W. R. Co. v. *Smith*, 250 U. S. 101 13
Pedersen v. *D. L. & W. R. Co.*, 229 U. S. 146 13
People v. *Hudson River Connecting R. R. Corp.*, 229 N. Y. 203-215 11
Philadelphia & Reading Co. v. *DiDonato*, 256 U. S. 327 14
Sou Ry. Co. v. *Puckett*, 244 U. S. 571 14
U. S. v. *Darby*, 312 U. S. 115 9
Warren-Bradshaw Drilling Co. v. *Hall*, —— U. S. ——, 87 L. Ed. Adv. Op. 99, No. 21, Oct Term 1942 ..... 9, 10

FEDERAL STATUTES

U. S. C., Tit. 28, Sec. 347(a) (jurisdiction of Supreme Court to review decisions of Circuit Court of Appeals on certiorari) 1
U. S. C., Tit. 29, Secs. 201-209, 52 Stat. 1060 (Fair Labor Standards Act) 2, 9
U. S. C., Tit. 33, Sec. 494, 37 Stat. 736 (Regulation of tolls on bridges of navigable waters) 14
U. S. C., Tit. 45, Sec. 51, 35 Stat. 65 (Fed. Employers' Liability Act) 13
U. S. C., Tit. 49, Secs. 301 et seq, 49 Stat. 543 (Motor Carrier Act of 1935) 14

OTHER AUTHORITIES

Wage & Hour Law Administrator's Opinions 19

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 284

H. T. OVERSTREET, R. BRAZLE, L. L. GARVIN,
Petitioners,

v.

THE NORTH SHORE CORPORATION.

BRIEF FOR PETITIONERS.

I. Opinions Below.

The opinion of the District Court (R. 8-10) is reported in 43 F. Supp. 445. The opinion of the Circuit Court of Appeals (R. 11-13) is reported in 128 F. (2d) 450.

II. Jurisdiction.

This Court has already exercised its jurisdiction under U. S. Code Tit. 28, Sec. 347 (a) to review the instant case, by entering, on October 12, 1942, its order granting the writ of certiorari to the Circuit Court of Appeals for the 5th Circuit (R. 13).

III. Statement of the Case.

Petitioners, together with others not parties to this petition, brought suit in the United States District Court for

the Southern District of Florida, seeking recovery from respondent and its affiliate Bay Shore Water & Light Company of divers amounts alleged to be due them under the Fair Labor Standards Act of 1938 (52 Stat. 1060, U. S. Code Title 29, Sections 201-219) for unpaid minimum wages, overtime compensation, additional equal amounts as liquidated damages, and attorneys' fees (R. 18).

Respondent moved to dismiss as to all of the plaintiffs (see original typewritten transcript of record pp. 11-12—not reproduced in the transcript of record as printed by the Clerk of this Court). Upon a memorandum opinion (R. 8-10; 43 F. Supp. 445) the District Court granted the motion, but with reference to such of the plaintiffs as were employed in the maintenance of the telephone line operated by Bay Shore Water and Light Company (not respondent) with leave to file an amended complaint. Petitioners not being thus employed, the District Court made the order of dismissal final as to them (R. 11), and from that order they appealed to the 5th Circuit Court of Appeals (see typewritten transcript of record page 21, not reproduced in the printed record).

On May 28, 1942, the Circuit Court rendered its decision (R. 11-13; 128 F. (2d) 450) affirming the District Court. On June 30, 1942, it denied, without opinion, petitioners' petition for rehearing (R. 13). On August 7, 1942, petitioners filed in this Court their petition for writ of certiorari with brief in support thereof and the petition was granted by this Court October 12, 1942 (R. 13).

Of the fourteen plaintiffs in the District Court only three were appellants in the Circuit Court, and are petitioners here. Of the two defendants in the District Court only one was appellee in the Circuit Court and is respondent here. As to all other parties, the action still remains in the District Court.

What this court is called upon to decide is whether the complaint states a cause of action against respondent on the part of the three petitioners. The allegations of the complaint (R. 1-8; amended as to petitioners Brazle and Garvin, R. 10) for present purposes are admitted to be true by the motion to dismiss. They may be summarized as follows:

Respondent is owner and operator of a toll road connecting with U. S. Highway No. 17, an arterial highway extending from Jacksonville, Florida, to New York City and points north. The toll road extends from Highway No. 17 to Fort George Island, an island just off the northern coast of Florida and separated therefrom by the intercoastal waterway which is crossed at Sisters' Creek by a drawbridge, also owned and operated by respondent as a part of the road. The toll road is the only means of land communication between Fort George Island and the rest of the United States.

The road is extensively used by vehicular traffic from points outside Florida to points on the toll road and beyond, and vice versa, and is an integral part of the highway system of the United States. On Fort George Island are located two large clubs whose membership mostly consists of persons from states other than Florida, who also use the road in interstate commerce. Also accessible by land only over the road are several fishing camps which rent boats and cabins and serve meals, used extensively by visitors from Georgia, South Carolina and other nearby states.

Residents and visitors along the road and on the island receive mail and parcels from other states over the road. The United States Post Office Department uses the road, delivering mail from states other than Florida to visitors and residents.

Sisters' Creek is an integral part of the intercoastal waterway from Miami to New York, which is considerably used in interstate commerce by pleasure craft and freight

vessels between Florida and the Northern states; it is crossed by a drawbridge operated by respondent which is frequently raised and lowered to permit the passage of boats engaged in interstate commerce. On the toll road are located retail stores which purchase in interstate commerce for resale various commodities produced in states other than Florida. The toll road is the shortest route both to Eastport and New Berlin and is used as a highway for the delivery of goods at those points.

Petitioner Overstreet was employed by respondent from the effective date of the Fair Labor Standards Act to April 15, 1939, to operate the drawbridge on the toll road, and it was his duty to raise and lower the bridge to allow boats to pass through Sisters' Creek, many of them being operated in interstate commerce daily. While subject to call for 24 hours a day, he was actually on duty 16 hours a day, but was paid at the rate of $90.00 per month, which was less than the minimum provided by the Fair Labor Standards Act.

Petitioner Brazle was a laborer employed by respondent from the effective date of the Fair Labor Standards Act until or about August 1, 1940. His duties consisted of maintenance and repair work of the toll road and of bridges which were parts of the toll road. During the stated period he worked approximately 55 hours per week but was paid only at the rate of 25¢ an hour up to August 1, 1940, and from that time until November 1, *1940* at the rate of 27½¢ per hour, which was at all times less than the minimum prescribed by the Act.

Petitioner Garvin was employed by the respondent to sell and collect toll tickets from vehicles using the toll road from December 14, 1940, to date of suit, during which period he worked approximately 84 hours a week at a regular wage of $50.00 a month, which was less than the minimum prescribed by the Act.

No overtime compensation was received by any of the petitioners from the respondent.

IV. Question Presented.

There is but a single main question, viz.: Does not the protection of the Fair Labor Standards Act of 1938 extend to the following classes of employees of a corporation operating a toll road extensively used as a highway for conveyance of passengers and goods in interstate commerce:

(a) One employed to tend and operate a drawbridge crossing a navigable stream which is an artery of commerce and forms an integral part of the highway?

(b) One employed to do repair and maintenance work on the road and bridge?

(c) One employed to sell tickets and collect tolls for passage on the road?

The District and Circuit Courts in effect answered this question in the negative as to all three classes of employees, and petitioners contend that they erred in so doing. Upon considering the opinions of the District Court (R. 8-10) and the Circuit Court (R. 11-13) certain subsidiary questions also arise; and these will be dealt with in the argument below.

V. Specification of Errors.

Petitioners intend to urge all of the errors assigned on the appeal of the case from the District Court to the Circuit Court of Appeals. The assignment of errors was included in the typewritten transcript furnished this Court by petitioners (pp. 22-23), but as it was not reproduced in the transcript printed by the Clerk, they are copied below:

1. The court erred in ruling that a toll road which is a part of the highway system of the United States, and crosses

navigable waterways, and operates a draw bridge over the intercoastal canal as an integral part of said highway is not such an instrumentality of interstate commerce as to place the operating and maintenance employees of such road under the provisions of the Fair Labor Standards Act of 1938.

2. The court erred in ruling that a draw bridge tender on a toll road, who operates a draw bridge over an interstate navigable waterway, to-wit: the intercoastal canal is not an employee engaged in interstate commerce under the terms of the Fair Labor Standards Act of 1938.

3. The court erred in ruling that laborers engaged in maintenance of a toll road and bridges, where the toll road and bridges are a part of the highway system of the United States, and cross navigable water used in interstate commerce, and the road is used in interstate commerce, though wholly within the State of Florida, are not employees engaged in interstate commerce under the terms of the Fair Labor Standards Act of 1938.

4. The court erred in ruling that an employee of a toll road which is a part of the highway system of the United States, who sells and collects tickets from interstate vehicular traffic for passage over the toll road and its bridges over navigable water are not employees engaged in interstate commerce under the terms of the Fair Labor Standards Act of 1938.

VI. Argument.

A. The Circuit Court of Appeals erred fundamentally in holding that the coverage of the employee under the Act must be determined by the relation of the employer to interstate commerce.

In the course of its opinion the Circuit Court said (R. 13):

> "If the North Shore Corporation, the employer, was not engaging in interstate commerce by virtue of own-

ing and operating the toll road, certainly those employees whose duties consisted in executing the business of the company were not engaging in interstate commerce."

Now petitioners' claims against respondent are grounded upon Sections 6 and 7 (a) of the Fair Labor Standards Act (see App. "A"). Those sections regulate minimum rates of pay and additional pay for overtime solely upon the relationship of the *employee* to commerce, not that of the *employer*, whether the employee is engaged "in commerce" or "in the production of goods for commerce".

The language of the statute is free from ambiguity in this respect and the Circuit Court should have given it full effect as written. This Court did so in *Kirschbaum* v. *Walling* and *Arsenal Building Corp.* v. *Walling*, —— U. S. ——, 86 L. Ed. 1054 (Nos. 910 and 924, Oct. Term, 1941), by determining that the Act covered certain employees of the owners of "loft" buildings because of the relation of their particular duties to the interstate commerce carried on, not by the owners of the buildings, but by their tenants. No determination was made that the building owners were engaged in commerce or in the production of goods for commerce. It is fair to point out that when the Circuit Court reached its decision (May 28, 1942—R. 11), this Court's decision in the *Kirschbaum* case had not been rendered.

B. The Circuit Court of Appeals further erred in resting its judgment upon decisions of this Court which were not relevant at all to the case at bar.

The error of the Circuit Court of Appeals in determining the coverage of the employees (petitioners) by the relation of the employer (respondent) to interstate commerce led it into another error even more glaring. The Circuit Court rested its decision upon the decisions of this Court

in *Henderson Bridge Co.* v. *Kentucky*, 166 U. S. 150, and *Detroit Bridge Co.* v. *Tax Board*, 294 U. S. 83, which decisions it referred to as "decisive of the narrow issue here presented" (R. 12).

The District Judge's decision was based upon the same cases (R. 8-9) although by an obvious clerical error the District Judge referred to the *Covington* case (*Covington & Cincinnati Bridge Co.* v. *Kentucky*, 154 U. S. 204) instead of the *Henderson* case.

Now both the *Detroit Bridge Company* case and the *Henderson Bridge Co.* case dealt solely with the status of corporations which claimed that, on account of the nature of the business in which they were engaged, the taxes which the states of Michigan and Kentucky proposed to collect from them would be unconstitutional as a burden on interstate commerce. Neither case involved in any way the status of employees of those corporations.

But an additional and even stronger argument against the reliance placed by the Circuit Court upon those two cases is found upon further analysis. It is this: Both of these cases are concerned with the validity of State franchise taxes imposed upon all corporations similarly situated (whether or not engaged in commerce). These two cases, as well as other decisions of this Court, merely ruled that such taxes were not a burden upon interstate commerce. As this Court said in *Kirschbaum* v. *Walling*, supra (L. Ed. text, p. 1057):

> "Similarly, enterprises subject to federal industrial regulation may nevertheless be taxed by the States without putting an unconstitutional burden on interstate commerce."

Remembering that the quoted statement was pronounced by this Court in expounding the underlying philosophy of the Fair Labor Standards Act, we submit it is conclusive

upon the inapplicability of the *Henderson Bridge* and *Detroit Bridge* cases to the case at bar.

C. The Complaint shows Petitioners are "Engaged in Commerce" and so are within the coverage of the Fair Labor Standards Act.

So far this Court has not been called upon to decide any case under the Fair Labor Standards Act involving the employees of a privately owned highway or toll road used as an instrumentality of interstate commerce; and the instant case furnishes the only reported decisions by inferior Federal Courts on this question.

Therefore, the problem is to be decided by a fair construction of the statute itself (52 Stat. 1060, U. S. C. Title 29, Secs. 201-219), taking into consideration the decisions of this and other federal courts in other cases arising under the Fair Labor Standards Act and under other federal statutes presenting similar problems. The section of the statute upon which petitioners particularly rely are Sections 2, 6, 7(a), 7(d), and 16(b). A copy of those sections is attached as Appendix "A" to this Brief.

When this Court declared the Fair Labor Standards Act constitutional in *U. S.* v. *Darby*, supra, it said (312 U. S. 115):

> "The motive and purpose of the present regulation are plainly to make effective the congressional conception of public policy that interstate commerce should not be made the instrument of competition in the distribution of goods produced under substandard labor conditions which competition is injurious to the commerce and to the states from and to which the commerce flows."

The broad purposes of the act thus declared by the Court in the *Darby* case have been fully upheld in other decisions, notably *Kirschbaum* v. *Walling*, supra, and *Warren-Brad-*

shaw Drilling Co. v. *Hall*, —— U. S. ——, 87 L. Ed. Adv. Op. 99 (No. 21, Oct. Term, 1942).

In the *Kirschbaum* and *Arsenal Building Corporation* cases, supra, this Court held that persons acting as engineers, firemen, electricians, elevator operators, watchmen and porters in "loft" buildings most of whose tenants were engaged in interstate commerce were within the coverage of the act. In those cases the Court held that:

> "Without light and heat and power the tenants could not engage, as they do, in the production of goods for interstate commerce. The maintenance of a safe, habitable building is indispensable to that activity."

In neither case was the owner of the building engaged in producing goods for commerce.

The *Warren-Bradshaw Drilling Company* case, supra, involved claims under the Fair Labor Standards Act of members of a rotary drilling crew employed by the Warren-Bradshaw Company which contracted with the owners or lessees of oil lands to drill wells to an agreed upon depth short of the oil sand stratum. When that depth was reached the rotary crew was removed and another crew was charged with the job of bringing the well into production, or demonstrating that it was merely a "dry hole". Warren-Bradshaw Company was not the owner or lessee of the lands upon which the drill crew drilled, and had no interest in the oil produced. Nevertheless, this Court, finding that there was reasonable ground for Warren-Bradshaw to anticipate that oil produced by the wells drilled would move in interstate commerce, held that the members of the drilling crew were within the protection of the Fair Labor Standards Act.

To like effect see *Fleming* v. *Hawkeye Pearl Button Co.* (C. C. A. 8, 1940), 113 Fed. (2d) 52, 56. There employees engaged in cutting round pieces of shell from fresh-water

clam shells which were later pressed into buttons shipped in interstate commerce, were held to be within the protection of the Act.

The three cases last cited, it is true, are all concerned with the definition of employees "engaged • • • in the production of goods for commerce". No contention is made by petitioners that they are within that category, for their claim is that they are "engaged in commerce". Nevertheless, the cases just cited exemplify the liberal construction of the act declared by this Court to be the governing rule in the excerpt from the *Darby* case quoted above.

A broad construction of the coverage of the Act such as petitioners are contending for is likewise given in a number of cases arising in Federal District Courts and State Courts (see cases cited at pages 8-9 of the "Memorandum for the Administrator of the Wage and Hour Division of the Department of Labor" filed in this case in support of the petition for certiorari by the Solicitor General, as amicus curiae.

Because of the paucity of authority on the precise question presented here, we believe this Court will be interested in considering the decision of a Municipal Court in New York City dealing with the Fair Labor Standards Act, viz.: *Atkocus* v. *Terker*, 4 Labor Cases 60, 724. In that case plaintiff, a watchman on a bridge over a navigable stream located entirely within the state of New York, sued under the Act and the Court, upholding his contention, quoted from *People* v. *Hudson River Connecting Railroad Corp.*, 228 N. Y. 203, 215 (Cert. den. 254 U. S. 631), as follows:

> "Congress is given authority over interstate commerce in Article 1, Section 8, of the Constitution. • • •
> In construing this power granted, the words must be understood as employed in their natural sense, as is said by Chief Justice Marshall in Gibbons v. Ogden (9 Wheat. 1, 194), 'Commerce among the states cannot

stop at the external boundary line of each state, *but may be introduced into the interior'.*

It is a comprehensive clause including within its intent, the instruments and means by which interstate commerce is or may be carried on, even if those means or instruments are such as are inherently within a single state, such as the wharf of a trans-atlantic line or the tracks over which pass trains en route from state to state, or the engine used to draw those trains, be it used for ever so short a haul within the state, and if this authority extends to the tracks and the engine, though used wholly within the state, *surely it also includes bridges over which both of these pass and this is particularly true if that bridge cross a navigable stream, the first great recognized instrument of interstate commerce.* (Erie R. R. Co. v. New York, 233 U. S. 671.)" (Italics supplied.)

In this connection the rulings of the Wage and Hour Administrator himself, while not controlling, are persuasive. To avoid burdening the body of this brief there are attached, as Appendix "B", two opinions of the Wage and Hour Administrator on this question, both of them supporting petitioners' position. These rulings of the administrator are in harmony with the authorities and argument set forth above, and when all of these factors are considered we believe the court will find that the allegations of the complaint clearly make out a prima facie case under the Act.

Sections 6 and 7 of the Fair Labor Standards Act (App. "A") place upon a complete parity employees "engaged in commerce" with those "engaged in the production of goods for commerce" and there can be no good reason for construing the definition of the former class any more narrowly than the definition of the latter class. If the same liberality of interpretation applied in the *Kirschbaum* and *Warren-Bradshaw* cases be applied to the situation of these petitioners, the coverage of the act must be extended to them.

If Overstreet did not raise and lower the drawbridge over Sisters' Creek, the interstate commerce could not flow over the inland waterway. If Brazle did not keep the road and bridge in repair there would be interference with interstate commerce, and if Garvin did not collect the tolls on the road there would be no money with which to maintain the road.

D. **The construction of the Fair Labor Standards Act for which petitioners contend is strongly supported by decisions under comparable Federal statutes.**

The Federal Employers' Liability Act (35 Stat. 65, U. S. C. Tit. 45, Sec. 51) extends coverage only to those employees of a railroad who "are employed in such (i.e. interstate) commerce." Decisions of this Court under that Act, disregarding technicalities, have defined the phrase so as to include employees performing "work which has for its immediate purpose the furthering of the conduct of interstate commerce." *Kinzell* v. *Chicago, M. & S. P. Ry. Co.*, 250 U. S. 130, 133.

Two other cases under that Act are of particular interest here because they are concerned with those working on railroad bridges or serving those so engaged:

Pedersen v. *D. L. & W. R. Co.*, 229 U. S. 146. In that case the court holding that one carrying material for repair of a railroad bridge was "engaged in commerce", said (p. 151):

> "*But independently of the statute*, we are of the opinion that the work of keeping such instrumentalities in a proper state of repair while thus used is so closely related to such commerce as to be in practice and in legal contemplation a part of it." (Italics supplied.)

P. B. & W. R. Co. v. *Smith*, 250 U. S. 101, in which this Court held that a man who cooked for a gang of carpenters

repairing a railroad bridge was "engaged in commerce".

In a number of other cases arising under the Employers' Liability Act, this Court has exercised the like liberality in defining those protected by its coverage: *Louisville & Nashville R. R. Co.* v. *Parker*, 242 U. S. 13, 14-15; *Southern Ry. Co.* v. *Puckett*, 244 U. S. 571-573; *Philadelphia & Reading Ry. Co.* v. *DiDonato*, 256 U. S. 327, 329-331.

Nor is the fact that the cases cited just above deal with the employees of a railroad company, while the case at bar deals with employees of a company operating a highway used for interstate commerce, at all material.

By the Motor Carrier Act of 1935 (49 Stat. 543, U. S. C. Tit. 49, Sec. 301 et seq.) Congress recognized the importance of highways for motor traffic in interstate commerce, and prescribed that such traffic should be regulated as to rates and service by the Interstate Commerce Commission.

By an act passed in 1906, Congress vested in the Secretary of War the duty to regulate tolls on bridges crossing navigable waters, whether constituting interstate boundaries or not (37 Stat. 736, U. S. C. Tit. 33, Sec. 494). In a case under that statute, *Clarksburg-Columbus Short Route Bridge Co.* v. *Woodring*, 89 F. (2d) 788, 794, the Circuit Court of Appeals for the District of Columbia said:

> "Under modern conditions there has grown up a vast and ever expanding network of highways, extending from one end of the country to the other, over which commerce and traffic flow by motor lines and upon the development of which federal and State Governments are expending millions of dollars. The extent to which interstate commerce is carried on over these lines of highways has so threatened the abilities of the railroads to maintain themselves against this competition that Congress has recently found it necessary to place the operators of this commerce under the control of the interstate commerce commission? Motor Vehicle Act of 1935.

"We think that the fixing of just and reasonable rates, whether it be for motor carriers moving over these highways or for structures, such as bridges, which constitute integral parts of such highways should be governed by the same principles which control the rate making of railway traffic." (Italics supplied.)

This Court granted certiorari (301 U. S. 679), but later the case was dismissed as being moot (302 U. S. 658), and no inference arises that this Court disagreed with the legal principles declared by the Circuit Court.

Thus, it is seen that Congress has expressly recognized the important function now played in interstate commerce by highways and highway bridges, and it is fair to assume that the same liberal rulings made by this Court with respect to coverage under the Employers' Liability Act will also be made in determining the definition of employees "engaged in commerce" under the Fair Labor Standards Act. That is particularly true with reference to the duties which all three of these petitioners perform in regard to the bridge over Sisters' Creek. Commerce could not flow through the waterway unless Overstreet raised the draw; unless Brazle made the necessary repairs on the bridge, motor traffic on the road would come to a standstill; if Garvin did not collect tolls, there would be no one to maintain the road or the bridge.

The allegation in the complaint with respect to the function played by Sisters' Creek in interstate commerce is no mere figment of the imagination. The memorandum filed in this Court by the Solicitor General as amicus curiae (page 4, Note 2) digests information officially given to Congress by the Chief of Engineers of the U. S. Army, of which this Court will take judicial cognizance. It shows very substantial traffic on the waterway; that three-fourths of the freight carried in the year 1940, amounting to 219,614 tons, represented shipments in interstate commerce; that commercial

vessels made over 5,000 trips over this portion of the waterway during that year. Surely those who operated and those who assisted in the maintenance of this bridge were performing a real service to interstate commerce.

Conclusion.

Viewing the matter in its broader aspect, if the respondent Corporation does not pay its employees according to the minimum standards prescribed by the Fair Labor Standards Act, how can it keep its employees against the competition of railroads and other interstate carriers who do meet the minimum standards provided by the Act? Such a policy persisted in will necessarily drive competent employees into other lines of activity where proper compensation will be paid them, and thus the toll road operated by respondent will correspondingly lose its power to perform its function as an instrumentality of interstate commerce.

For the reasons above set forth the action of the lower courts in sustaining the motion to dismiss the complaint should be reversed, and the case remanded for appropriate proceedings.

Respectfully submitted,

LUCIEN H. BOOOS,
1001 Bisbee Building,
Jacksonville, Florida,
Attorney for Petitioners.

DILLON HARTRIDGE,
Hildebrandt Building,
Jacksonville, Florida.
Of Counsel for Petitioners.

APPENDIX A.

Excerpts from Fair Labor Standards Act of 1938

52 Stat. 1060, U. S. Code Tit. 29, Secs. 201-219

Sec. 2. (a) The Congress hereby finds that the existence, in industries engaged in commerce or in the production of goods for commerce, of labor conditions detrimental to the maintenance of the minimum standard of living necessary for health, efficiency, and general wellbeing of workers (1) causes commerce and the channels and instrumentalities of commerce to be used to spread and perpetuate such labor conditions among the workers of the several States; (2) burdens commerce and the free flow of goods in commerce; (3) constitutes an unfair method of competition in commerce; (4) leads to labor disputes burdening and obstructing commerce and the free flow of goods in commerce; and (5) interferes with the orderly and fair marketing of goods in commerce.

(b) It is hereby declared to be the policy of this Act, through the exercise by Congress of its power to regulate commerce among the several States, to correct and as rapidly as practicable to eliminate the conditions above referred to in such industries without substantially curtailing employment or earning power.

Sec. 6 (a) Every employer shall pay to each of his employees who is engaged in commerce or in the production of goods for commerce wages at the following rates—

(1) during the first year from the effective date of this section, not less than 25 cents an hour,

(2) during the next six years from such date, not less than 30 cents an hour,

(3) after the expiration of seven years from such date, not less than 40 cents an hour, or the rate (not less than 30 cents an hour) prescribed in the applicable order of the Administrator issued under section 8.

(b) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

Sec. 7 (a) No employer shall, except as otherwise provided in this section, employ any of his employees who is *engaged in commerce or in the production of goods for commerce*—

(1) for a workweek longer than forty-four hours during the first year from the effective date of this section,

(2) for a workweek longer than forty-two hours during second year from such date, or

(3) for a workweek longer than forty hours after the expiration of the second year from such date,

unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed.

* * * * * * *

Sec. 7 (d) This section shall take effect upon the expiration of one hundred and twenty days from the date of enactment of this Act.

Sec. 16 (b) Any employer who violates the provisions of section 6 or section 7 of this Act shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages. Action to recover such liability may be maintained by any court of competent jurisdiction by any one or more employees for and in behalf of himself or themselves and other employees similarly situated, or such employee or employees may designate an agent or representative to maintain such action for and in behalf of all employees similarly situated. The court in such action, shall, in addition to any judgment awarded to the plaintiff or plaintiffs, allow a reasonable attorney's fee to be paid by the defendant, and costs of the action.

APPENDIX B.

Opinions of Wage and Hour Administrator

Wage and Hour Manual, 1941 Edition published by Bureau of National Affairs, Washington, D. C.

P. 34:

"13, Employees of contractors engaged in maintaining, repairing or reconstructing railroads, ships, highways, bridges, pipe lines, navigable waters of the United States, or other essential instrumentalities of interstate or foreign commerce would seem to be engaged in interstate commerce and subject to the Act."

P. 54:

"State Road Repairs—Question: Does the Fair Labor Standards Act apply to those employees of a contractor engaged in repairing a state highway who do not actually take part in the physical construction or repair of the highway?

Answer: (Assistant Solicitor in Charge of Opinions): You state that an employer who has contracted to repair a state highway has leased a gravel pit near the location of the job in which he employs employees solely for the purpose of digging gravel for the highway. In our opinion your position, that the employees engaged exclusively in the production of the gravel are not covered by the Act, is correct.

With respect to the employees engaged in mixing the gravel with oil to produce the black-top material, it is our opinion that they are not covered, provided, of course, that they take no part in the actual physical construction or repair of the highway. If, however, such employees, in addition to the mixing operations, are engaged in pouring macadam on the roadbed or in the rolling and pressing operations performed on the poured macadam, it is our opinion that they are covered by the Act under the principles expressed in paragraph 13 of Interpretative Bulletin No. 5 (see page 34)."